

The Strafford Guidance Center, Inc. and Service Employees International Union Local 285, AFL-CIO, CLC. Case 1-CA-17999

March 31, 1981

DECISION AND ORDER

Upon a charge filed on October 27, 1980, by Service Employees International Union Local 285, AFL-CIO, CLC, herein called the Union, and duly served on The Strafford Guidance Center, Inc., herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 1, issued a complaint on November 4, 1980, against the Respondent, alleging that the Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on April 10, 1980, following a Board election in Case 1-RC-16657, the Union was duly certified as the exclusive collective-bargaining representative of the Respondent's employees in the unit found appropriate;¹ and that, commencing on or about October 23, 1980, and at all times thereafter, the Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On November 12, 1980, the Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, and asserting as an affirmative defense that the Board lacks jurisdiction over the Respondent and that the certification was invalid because the Regional Director and the Board erroneously overruled the Respondent's objections to the election in Case 1-RC-16657.

On December 22, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Thereafter, the Respondent filed an objection to the Motion for Summary Judgment. Subsequently, on January 7, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why

the General Counsel's Motion for Summary Judgment should not be granted. The Respondent filed a response to the Notice To Show Cause.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

Examination of the record shows that, pursuant to a petition filed by the Union in Case 1-RC-16657, a hearing was held, and thereafter on December 31, 1979, the Acting Regional Director issued a Decision and Direction of Elections. The Decision and Direction of Elections set out in detail the facts concerning the Respondent's operations that provide community mental health services under a contract with the Division of Mental Health of the State of New Hampshire, and fully discussed the Respondent's contention that the Board should not assert jurisdiction because of the Respondent's relationship with the State of New Hampshire. Applying the Board's "right of control" test explicated in *National Transportation Service, Inc.*, 240 NLRB 565 (1979), the Acting Regional Director found that the Respondent was an employer within the meaning of Section 2(2) of the Act, and operated with a sufficient degree of control of its labor relations policy to be able to bargain effectively.² He further found that the Respondent was a health care institution within the meaning of Section 2(14) of the Act, and met the Board's discretionary standards for asserting jurisdiction established in *East Oakland Community Health Alliance, Inc.*, 218 NLRB 1270 (1975). Accordingly, he found that the Respondent's operations affect commerce within the meaning of the Act, and that it would effectuate the purposes of the Act to assert jurisdiction.

The Board denied a request by the Respondent to grant review of the Acting Regional Director's Decision and Direction of Elections.

On January 24, 1980, a *Sonotone*-type³ election was conducted, in which professional employees voted to be included in a unit with nonprofessional employees, and a majority of the combined votes were cast for the Union.

The Respondent filed objections to the election, asserting that the Union had made material misrep-

¹ Official notice is taken of the record in the representation proceeding, Case 1-RC-16657, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enf'd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enf'd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enf'd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

² The Respondent's board of directors, which does not include public officials, establishes programs and policies; and an executive director, hired by the directors, supervises the programs on a day-to-day basis. While the State of New Hampshire exercises some control over the Respondent through the budgetary process, general operating guidelines, and certain minimum standards, the Acting Regional Director found that the Respondent has substantial autonomy with respect to hiring, firing, supervising, disciplining, assigning work, and adjusting grievances, and has considerable latitude in setting wages.

³ *Sonotone Corporation*, 90 NLRB 1236 (1950).

resentations which tended to have a significant impact on the election, and that issuance of complaint against the Respondent in another case on the day preceding the election had interfered with the proper atmosphere of the election. The Acting Regional Director overruled the objections and certified the Union as bargaining representative in a supplemental decision dated April 10, 1980.

The Respondent excepted to the supplemental decision on objections, and again raised the question of jurisdiction. It requested the Board to reverse the previous determination to assert jurisdiction and to set aside the original Decision and Direction of Elections. In the event that request was not granted, the Respondent urged the Board to set aside the supplemental decision and certification and order a new election. Later the Respondent filed a motion to submit supplemental authority and a motion for leave to submit supplemental authority.

The Board denied the Respondent's motions and the request for review of the supplemental decision.

In this refusal-to-bargain case, the Respondent contends that the Union was improperly certified, and requests the Board to reconsider its assertion of jurisdiction and its overruling of objections. The Respondent argues that the *National Transportation* jurisdictional test should be reconsidered by the Board as it has proved unworkable, and also takes the position that the test was improperly applied in these proceedings.

We cannot accept the Respondent's defenses. We have previously considered its jurisdictional arguments and denied its request that we review the original decision asserting jurisdiction, and we see no reason to reconsider the jurisdictional test adopted in *National Transportation*.⁴ We have also previously denied the Respondent's request that we review the supplemental decision overruling objections.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.⁵

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the

Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.

On the basis of our disposition of the Respondent's defenses and the Respondent's admission of its refusal to bargain, we shall grant the General Counsel's Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, a corporation organized under the laws of the State of New Hampshire, maintains its principal office and facility at 576 Central Avenue, Dover, New Hampshire, and other facilities at 787 Central Avenue, Dover, New Hampshire, and 95 Charles Street, Rochester, New Hampshire. It is engaged in providing mental health services for Strafford County, New Hampshire.

In the course of providing mental health services, the Respondent receives gross annual revenue in excess of \$250,000 and annually receives goods valued in excess of \$3,000 directly from points located outside the State of New Hampshire and goods valued in excess of \$20,000, indirectly from points located outside the State of New Hampshire.

We find, on the basis of the foregoing, that the Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Service Employees International Union Local 285, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. The Representation Proceeding

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

⁴ See our more recent decisions discussing *National Transportation*: *The New York Institute for the Education of the Blind*, 254 NLRB No. 85 (1981); *Gaithersburg-Washington Grove Fire Dept., Inc.*, 251 NLRB 294 (1980); *Soy City Bus Services, Division of R. W. Harmon & Sons, Inc.*, 249 NLRB 1169 (1980).

⁵ See *Pittsburgh Plate Glass Co. v. N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

All full-time and regular part-time employees, including secretary-typist, secretary-receptionists, secretary, intake secretary and fee assessors, maintenance employees, psychiatric social worker, after care counselors, intake crisis workers, associate psychologists, volunteer coordinators, day treatment therapists, youth outreach workers, counselors and secretary/computer operators employed by the Respondent at the following locations: 576 Central Avenue, Dover, New Hampshire; 787 Central Avenue, Dover, New Hampshire; and 95 Charles Street, Rochester, New Hampshire, but excluding lead secretary, executive director, assistant executive director, clinical director, office manager, business manager, director of intake and emergency services, coordinator youth outreach, coordinator of clinical services, psychiatrist, consultant psychiatrist, clinical psychologist, guards and supervisors as defined in the Act.

2. The certification

On December 31, 1979, a majority of the employees of the Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 1, designated the Union as their representative for the purposes of collective bargaining with the Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on April 10, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. The Request To Bargain and the Respondent's Refusal

Commencing on or about October 23, 1980, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about October 28, 1980, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since October 28, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date the Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. The Stafford Guidance Center, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Service Employees International Union Local 285, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time employees, including secretary-typists, secretary-receptionists, secretary, intake secretary and fee assessors, maintenance employees, psychiatric social worker, after care counselors, intake crisis workers, associate psychologists, volunteer coordinators, day treatment therapists, youth outreach workers, counselors and secretary/computer operators employed by the Respondent at the following locations: 576 Central Avenue, Dover, New Hampshire; 787 Cen-

tral Avenue, Dover, New Hampshire; and 95 Charles Street, Rochester, New Hampshire, but excluding lead secretary, executive director, assistant executive director, clinical director, office manager, business manager, director of intake and emergency services, coordinator youth outreach, coordinator of clinical services, psychiatrist, consultant psychiatrist, clinical psychologist, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since April 10, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 28, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of the Respondent in the appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, the Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The Strafford Guidance Center, Inc., Dover and Rochester, New Hampshire, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Service Employees International Union Local 285, AFL-CIO, CLC, as the exclusive bargaining representative of its employees in the following appropriate unit:

All full-time and regular part-time employees, including secretary-typists, secretary-receptionists, secretary, intake secretary and fee assessors, maintenance employees, psychiatric

social worker, after care counselors, intake crisis workers, associate psychologists, volunteer coordinators, day treatment therapists, youth outreach workers, counselors and secretary/computer operators employed by the Respondent at the following locations: 576 Central Avenue, Dover, New Hampshire; 787 Central Avenue, Dover, New Hampshire; and 95 Charles Street, Rochester, New Hampshire, but excluding lead secretary, executive director, assistant executive director, clinical director, office manager, business manager, director of intake and emergency services, coordinator youth outreach, coordinator of clinical services, psychiatrist, consultant psychiatrist, clinical psychologist, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facilities at 576 Central Avenue, Dover, New Hampshire, 787 Central Avenue, Dover, New Hampshire, and 95 Charles Street, Rochester, New Hampshire, copies of the attached notice marked "Appendix."⁶ Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

⁶ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Service Employees International Union Local 285, AFL-CIO, CLC, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All full-time and regular part-time employees, including secretary-typists, secretary-receptionist, secretary, intake secretary and fee assessors, maintenance employees, psychiatric social worker, after care counselors, intake crisis workers, associate psychologists, volunteer coordinators, day treatment therapists, youth outreach workers, counselors and secretary/computer operators employed by the Respondent at the following locations: 576 Central Avenue, Dover, New Hampshire; 787 Central Avenue, Dover, New Hampshire; and 95 Charles Street, Rochester, New Hampshire, but excluding lead secretary, executive director, assistant executive director, clinical director, office manager, business manager, director of intake and emergency services, coordinator youth outreach, coordinator of clinical services, psychiatrist, consultant psychiatrist, clinical psychologist, guards and supervisors as defined in the Act.

THE STRAFFORD GUIDANCE CENTER,
INC.